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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 570

DONALD R. LORD, BERNARD G. McGARRY, SR., McGARRY'S INC., J. E. POOR CO. INC., YE OLDE BROWN JUG INC., M. J. TOOMEY CORP., A.A.A. VENDING CO., CALLAHAN AMUSEMENT CO., MARIE G. McGARRY, JAMES HARRINGTON and CLAIRE HARRINGTON, JOHN W. GALVIN and ISABELLE GALVIN, THOMAS A. CALLAHAN, S. LEO SWARTZ and LOUIS DEFAZIO,

Petitioners,

vs.

ALVIN M. KELLEY, DISTRICT DIRECTOR AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, JOHN B. FLATTERY, SPECIAL AGENT OF INTELLIGENCE AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, CHARLES R. McNALLY, SPECIAL AGENT OF INTELLIGENCE AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, and DONALD YOUNG, REVENUE AGENT AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

Without attempting to defend the decisions below, the Government asks this Court to deny review of a judgment which permits it to obtain, by administrative process, papers which were, admittedly, searched for and seized by Federal agents in violation of the Fourth Amendment. The result sought by the Solicitor is unconscionable and represents but one more step by the Government to obtain possession of the illegally seized records without having the appellate courts pass upon its right to do so.

The Government does not contend that the decision of the Court of Appeals or the proviso of the judgment of the District Court in its favor are correct. The Solicitor General does not argue that the questions raised do not merit the attention of this Court. He merely makes a confusing suggestion of mootness (Memorandum in Opposition, p. 3). The only ways in which the questions raised could be mooted would be if the Government were to obtain the illegally seized papers or if it were to abandon its attempts to obtain them. Neither event has occurred.

The Solicitor General's suggestion of mootness appears to rest on his assertion that review of the same questions presented by the petition may be had in the Court of Appeals for the First Circuit in five other cases.

Those appeals to the First Circuit raise questions concerning the conduct of proceedings to enforce Internal Revenue summonses and the issue involved in *Ryan* v. *United States*, No. 12, October Term 1964, and *United States* v. *Powell*, No. 54, October Term 1964,* which may be dispositive of those appeals. Should this occur, the Government will again be free to pursue further rounds of litigation made possible solely by the terms of a judgment which it cannot defend but review of which it resisted below and here.

The only litigation now pending which would determine the Government's right to regain the records of all parties who were victims of the seizure is now before this Court on the petition in *Lord* v. *Kelley*, No. 570.** Petitioners

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* The *only* issue presented by the appeals to the First Circuit which the Solicitor's office admitted was substantial is the issue involved in *Ryan* and *Powell*. Memorandum in Opposition to a stay herein, submitted to Mr. Justice Goldberg on or about October 6, 1964.

** The appeals recently filed in the First Circuit have as parties just five of the sixteen petitioners.

respectfully submit that the procedure which gives protection to the rights of all parties and at the same time is most conservative of the time of the Courts is to determine the propriety of the proviso in the judgment below before the Government proceeds under it to force petitioners to yield up the fruits of the illegal seizure.

Rather plainly, the Government, with its greater resources, would prefer a war of attrition with sixteen or more separate enforcement litigations against petitioners.

Despite respondents' representations to the Court of Appeals that the provision of the judgment sought to be reviewed here was of no effect and that they did not contemplate any proceedings to secure the illegally seized records, immediately upon dismissal of petitioners' appeal in the First Circuit, proceedings were commenced against five of petitioners. *The District Court's judgment was then treated by the Government and the Court as res adjudicata concerning the Government's right to the illegally seized records* (Petition, p. 19).

The sort of tactics which respondents feel privileged to use in attempting to moot the issues raised in the petition is exemplified by the mad scramble for a stay which followed the District Court's recent order enforcing five summonses for the seized records. Successive applications for a stay, pending this Court's decision on the petition, were made to the District Court (twice), to the Court of Appeals (twice), to this Court, to the District Court again,* and finally back to the Court of Appeals. Only on the fifth petition was it finally admitted by the Government that petitioners were entitled to a stay. Yet even then and thereafter, the Government continued to advance hypertechnical

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* See order of Mr. Justice Goldberg herein, dated on or about October 7, 1964.

grounds for denying a stay, *e.g.*, that petitioners had not filed a supersedeas bond.* During this period, five of petitioners were under threat of contempt if they did not yield the fruits of the illegal seizure to the Government (Petition, p. 19).

By such tactics, the Government has attempted to moot the questions raised in the petition, but it has not yet succeeded.

The memorandum in opposition has removed any doubt that the investigation which the Government is pursuing *commenced* with the illegal search and seizure found below. Respondents say:

> "Since the spring of 1962 the Internal Revenue Service has been conducting an investigation into the income tax liability of petitioners Bernard G. McGarry and Marie G. McGarry (Pet. App. 2a, 9a)." Memorandum in Opposition, p. 1.

The citation "Pet. App. 2a, 9a" refers to the opinions of the Courts below. According to these references, "the spring of 1962" is April 18, 1962, the date of the illegal search for and seizure of petitioners' papers by respondents, who are agents of the Internal Revenue Service.

Unless review is granted by this Court, respondents will continue to treat the judgment below as *res adjudicata* in order to secure the fruits of their illegal seizure. To prevent this, and to prevent the threatened multiplicity of suits to achieve an unlawful end, petitioners respectfully pray that the writ of *certiorari* issue.

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* Supersedeas bonds are uniformly not required in suppression actions nor in enforcement proceedings. There being no money judgment, there is no amount in which such a bond could be filed unless it be an amount fixed by the Court. Petitioners, nonetheless, stated in their petitions for stay their willingness to file a bond in any amount determined by the Court.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, it is respectfully prayed that the petition be granted.

Respectfully submitted,

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